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88-7194

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Arthur Lajuane Taylor, through his court appointed attorney, Bruce Dayton Livingston, moves this Court for leave to proceed *in forma pauperis*. In support of his motion petitioner states that Mr. Livingston has been his appointed counsel under the Criminal Justice Act of 1964, as amended, before both the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit. Because Mr. Livingston was appointed as counsel by both the district court and the court of appeals, it was not necessary to seek leave to proceed *in forma pauperis* in either of those courts.

Respectfully submitted.

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE DAYTON LIVINGSTON
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QUESTION PRESENTED

This is a statutory interpretation case. Petitioner Arthur Lajuane Taylor, having been convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), was sentenced to severely enhanced punishment under 18 U.S.C. § 924(e)(1) as a person "with three previous convictions . . . for a violent felony." Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 924(e) fails to define "burglary" despite its diverse meanings under federal, state or common law. In a 2-1 decision, the court of appeals declared that petitioner's prior Missouri convictions for burglary in the second degree satisfied section 924(e)'s predicate "violent felony" offenses and concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it."

The question presented is whether the court of appeals erred in holding that under 18 U.S.C. § 924(e) a "violent felony" included any crime labeled a "burglary" by any state, even though (1) Supreme Court precedents establish that when a term with an established common law meaning, like "burglary", is used without definition in a federal statute, *e.g.*, 18 U.S.C. § 924(e), the common law meaning is presumed to have been intended by

Congress; (2) some conduct labeled a "burglary" in one state would not be subject to sentence enhancement had it occurred in other states, where it would be denominated as "storehouse breaking" or "breaking and entering" and otherwise would not threaten others with a serious risk of physical injury; and (3) Congress specifically *deleted* a broad definition of burglary that would have included petitioner's prior convictions from the sentence enhancement statute?

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arthur Lajuane Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 864 F.2d 625. A transcript of the Sentencing Proceedings before the district court (Nangle, C.J.) is attached in the appendix (App. B, *infra*, 7a-16a).

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. (App. C, *infra*, 17a). The court of appeals denied petitioner's request for rehearing or rehearing en banc on March 7, 1989. (App. D, *infra*, 18a).

Petitioner seeks this Court's review by certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Introduction. The question presented by this Petition involves the statutory interpretation of the meaning of the term "violent felony," as used in the Federal statute providing for a severely enhanced penalty when persons convicted of being felons in possession of a firearm under 18 U.S.C. § 922(g) have "three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1) (Supp. IV 1986). Specifically at issue, is whether Congress' use of the undefined term "burglary" in the definition of "violent felony," 18 U.S.C. § 1924(e)(2)(B)(ii) (Supp. IV 1986), can be construed to encompass any or all of the varying meanings of the term "burglary" under state, federal and common law. It is a question upon which the courts of appeal are in sharp conflict. Moreover, in this case the court of appeals' opinion is in direct conflict with established precedent of this Court.

Here, a divided panel of the court of appeals (McMillian & Fagg, JJ., with Bright, J., dissenting) held that "burglary," as used by Congress in the definition of "violent felony" in section 924(e)(2) was unambiguous and "means 'burglary' however a state chooses to define it." *United States v. Taylor*, 864 F.2d 625, 627 (8th Cir. 1989) (App. 3a). The panel majority reached this conclusion notwithstanding that the conduct which would be labeled a "burglary" in some states, *e.g.*, Missouri, would not be so denominated in certain other states, *e.g.*, Maryland or Arkansas. The Fourth Circuit has already concluded that conduct labeled "storehouse breaking" in Maryland is not a violent felony within the meaning of 18 U.S.C. § 924(e). *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988).

Moreover, the majority was able to ignore the legislative history of section 924(e) by concluding essentially that all burglaries are the same. 864 F.2d at 627 (App. 31). In finding "burglary" to be unambiguous, the panel failed to examine the differences between the various crimes labeled burglary. As Judge Bright noted in dissent, the range of conduct in contemporary offenses labeled a burglary is significantly different from the common law: the breaking and entering of a dwelling of another in the nighttime with the intent to commit a felony. *Id.* Had the majority bothered to examine the legislative history of section 924(e), it would have realized that Congress had specifically *deleted* a broad definition of burglary from

the statute which was nearly identical to the burglary convictions relied upon by the majority and which otherwise would have included most state law burglaries. *Id.* at 628 (App. 4a).

Finally, the majority opinion ignored the established Supreme Court precedent that when federal statutes use undefined terms which have an accepted common law meaning, it is presumed that Congress intended the common law meaning to control. 864 F.2d at 627 (App. 31) (Bright, J., dissenting) (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). *Cf. Headspeth*, (undefined term "burglary" in 18 U.S.C. § 924(e) presumed to adopt common law meaning). Here again there is a split within the circuits on the meaning of burglary used in the statutory definition of a "violent felony" under section 924(e).

We discuss below the conflict among the circuits and the need for a definitive resolution by this Court (see pages 11 - 16 *infra*). First, however, we briefly describe the findings and conclusions below.

2. Proceedings in the District Court. Petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) on January 15, 1988. *See* Plea Agreement (App. E, *infra*, 19a-22a). As a condition of defendant's agreement to plead guilty, petitioner retained the right to appeal, solely upon the issue of whether he had the

requisite convictions for "violent felonies" that would subject him to punishment enhancement under 18 U.S.C. § 924(e)(1). *See* Transcript of Sentencing Proceedings (App. 8a). At petitioner's sentencing on March 2, 1988, the district court Nangle, C.J., denied petitioner's Motion to Strike respondent's Notice of Punishment Enhancement pursuant 18 U.S.C. § 924(e), (App. 16a), and sentenced petitioner to a term of fifteen (15) years imprisonment without possibility of parole pursuant to the enhancement statute. (App. 15a).

3. Proceedings in the Court of Appeals. Petitioner appealed to the Eighth Circuit on the sole issue of whether his sentencing pursuant to the enhancement statute, 18 U.S.C. § 924(e), was proper and argued that his convictions for burglary in the second degree under Missouri law, Mo. Rev. Stat. § 569.170, were not "violent felonies" under the enhancement statute. Accordingly, petitioner argued that he should have been sentenced under the provisions of former section 924(a)(1), 18 U.S.C. § 924(a)(1) (Supp. IV 1986), *subsequently amended* 18 U.S.C.A. § 924(a)(1) (West Supp. 1989).[1] By a 2-1 margin the court of appeals affirmed the district court's sentence. 864

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[1]Under former section 924(a)(1), Taylor was subject to a *maximum* sentence of five (5) years imprisonment *with* the possibility of parole.

F.2d at 627 (App. 3a). The panel majority found that petitioner's convictions for burglary in the second degree were indeed predicate offenses for sentence enhancement within the definition of "violent felony" in section 924(e)(2)(B), and that the modification of "violent felony" by the word "burglary" "means 'burglary' however a state chooses to define it." *Id.*

In dissent, Judge Bright disagreed with the majority's conclusion after "careful examination of the federal statute and its legislative history." *Id.* Instead, Judge Bright concluded that because "burglary" was not defined anywhere in the statutory framework of section 924(e), Congress must have intended to apply the common law meaning of burglary in the sentence enhancement statute. *Id.* Moreover, Judge Bright criticized the majority opinion because it led to the anomalous result that identical conduct would lead to dramatically different sentences based solely upon the nomenclature entitling an offense, rather than based upon the underlying conduct itself. "I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states." *Id.* at 628 (App 4a).

Judge Bright extensively analyzed the legislative history of the sentence enhancement statute and determined that it was intended to include as predicate offenses only those burglaries which "[present] a serious potential risk of injury to the person." *Id.* at 629 (App. 5a). He found it particularly

persuasive that Congress had specifically *deleted* a broad definition of burglary which would have included petitioner's convictions as predicate offenses for sentence enhancement. *Id.* In reaching this conclusion, Judge Bright also relied upon and quoted extensively the directly conflicting opinion of the Fourth Circuit in *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988). *Headspeth* held that "Congress intended to revert to the narrow common law definition of burglary in the amended statute." 852 F.2d at 758.

Finally, Judge Bright held that Missouri's second degree burglary offense did not fall within the catch-all statutory phrase of § 924(e) "or otherwise involves conduct that presents a serious risk of physical injury to another." 864 F.2d at 629 (App. 5a) (again relying extensively upon *Headspeth* and quoting extensively at 852 F.2d at 758-59).

Judge Bright also analyzed the Missouri statutory framework and concluded that burglary in the second degree was not a violent felony:

> Missouri law, by definition, distinguishes burglaries which are potentially violent and those not showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. In contrast, burglary in the second degree quoted in the majority opinion at 626, may relate to an unarmed burglary of an unoccupied building.

> Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

864 F.2d at 630 (App. 6a) (citations omitted). Judge Bright then concluded that this case "needs re-examination . . . by the United States Supreme Court." *Id.*

REASONS FOR GRANTING THE PETITION

In conflict with the decisions of this Court and of other courts of appeal, the court of appeals in this case incorrectly decided questions of great importance to the administration of the criminal penalty laws. The unwarranted extension of severely enhanced criminal penalties to a large number of persons threatens to overburden the nation's prison system in a manner not contemplated by Congress, while at the same time overburdening the nation's judicial system with numerous appeals arising from the confusing and conflicting interpretation of the penalty enhancement provision by the various courts of appeal.

This Court has held that when a term with an accepted common law meaning, such as burglary, is used in a federal statute without definition, it is presumed that Congress intended that the common law definition should apply. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette v. United States*, 342 U.S. 246, 263 (1952). With respect to the specific term and statute at issue in this case, the panel majority' interpretation directly conflicts with other recent court of appeals cases.

See, e.g., United States v. Headspeth, 852 F.2d 753, 757-58 (4th Cir. 1988).

Application of the majority's opinion also reaches the anomalous result that when conduct which is labeled a burglary in Missouri takes place in states which label such conduct something other than burglary, *i.e.*, "breaking and entering" or "storehouse breaking," that conduct would not be subject to punishment enhancement under § 924(e) merely because of where it took place, and not because of the substantive conduct itself. *See, e.g.* Ark. Rev. Stat § 5-39-202 (breaking and entering); Md. Crim. L. Code Ann. § 31B (1986) (breaking and entering storehouse). If this Court were to allow such an unintended, unwise and seemingly unconstitutional interpretation to stand, it will be deluged with numerous appeals in similar cases.

The circuits are in total disarray on the appropriate interpretation of the sentence enhancement provision of 18 U.S.C. § 924(e), adopting no fewer than four different approaches to this issue. Review by this Court is needed to abate this confusion. Review of this case is particularly appropriate for several reasons. First, because it was appealed solely on the question of law respecting the interpretation of the sentencing enhancement provision of § 924(e), it is less limited by facts peculiar to one specific case. Second, the approach adopted by the majority opinion of the panel directly conflicts with both

established Supreme Court precedent and the expressed intention of Congress in the legislative history.

Finally, burglaries that give rise to sentence enhancement in this case occurred in 1963 and 1971. (App. 13a). These supposedly "violent felonies" were found by a dissenting judge from the court of appeals to be non-violent by definition under the Missouri statutory framework.[2] 864 F.2d at 630 (App. 6a). Given the 43 year-old petitioner's age, his sentence barely exceeds his life expectancy. Based upon the age of the convictions at issue, and the dubious (non-existent) potential for violence under those offenses as defined under Missouri law, it would be a grave miscarriage of justice to allow petitioner to remain incarcerated without opportunity for parole for the next fifteen (15) years. Accordingly, a review by this Court is warranted.

A. The Conflict Among the Circuits Requires Resolution by this Court.

As Judge Bright recognized in dissent from the court of

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[2]The statutory framework for burglary under Missouri law ascribes all conduct which is potentially violent into the charge of burglary in the first degree. Petitioner's convictions were for burglary in the second degree, which by definition can only be unarmed burglaries of unoccupied buildings without any threat of injury to non-participants. *Compare* Mo. Rev. Stat. § 569.160 (1986) *with id.* § 569.170.

appeals' opinion, the circuits are in conflict on the question of the proper statutory interpretation of the definition of "violent felony" in the sentence enhancement provision of 18 U.S.C. § 924(e). Although Judge Bright relied primarily upon *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988), the conflict in the circuits is far more pervasive than a simple conflict between the Fourth and Eighth Circuit.

Four different approaches to the problem of interpreting the sentence enhancement provision of § 924(e) have been established by various courts of appeal. The Eighth and Seventh Circuits have held that any burglary is a predicate offense under § 924(e). *United States v. Portwood*, 857 F.2d 1221, 1223-24 (8th Cir. 1988) ("burglary" means any crime that a state chooses to label "burglary"); *United States v. Dickerson*, 857 F.2d 414, 419 (7th Cir. 1988) ("all burglaries satisfy the prerequisites of § 924"). The Ninth Circuit, in contrast, stated that "we look to the federal definition when determining whether a defendant was convicted of a violent felony." *United States v. Sherbondy*, 865 F.2d 996, 1005 (9th Cir. 1988).

Remarkably, the Eleventh Circuit interpreted "burglary" to mean "any burglary that would have met the definition of burglary under the previous act." *United States v. Hill*, 863 F.2d 1575, 1582 (11th Cir. 1989). By "previous act," the Eleventh Circuit was referring to 18 U.S.C. (App. II) § 1202 (repealed), which defined burglary as "'any felony consisting of entering or

remaining surreptitiously within a building that is property of another within the intent to engage in conduct constituting a federal or state offense.'" *Id.* at 1578. The Eleventh Circuit's interpretation is particularly surprising because Congress specifically deleted that definition of burglary from present § 924(e) as part of its effort to change the statute's focus from "robbery" and "burglary" to "violent felonies." Congress' affirmative act in deleting the broad definition of burglary reflects its intent that only those burglaries which posed a serious risk of physical injury to others were to remain as predicate offenses for enhanced punishment. *See Headspeth*, 852 F.2d at 758.

As Judge Bright stated in dissent in this case, "*Headspeth's* analysis of the legislative history is instructive and dispositive." 864 F.2d at 628 (App 4a).

> At one point, § 924(e) did indeed contain a definition of burglary which would encompass Maryland's storehouse breaking offense. As originally enacted, § 924(e)'s sentence enhancement provision was triggered only by previous convictions for either 'robbery' or 'burglary.' Section 924(e)(B) then specifically defined 'burglary' as 'any crime punishable by a term of imprisonment exceeding one (1) year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense.' This definition of burglary, which was considerably broader than its common law counterpart, would of course cover storehouse breaking, as that offense is defined in Maryland.

> But, this broad statutory definition of burglary was extremely short-lived. Two days after § 924(e) was enacted -- and several months before it became effective -- Congress began to consider expanding the list of predicate offenses that would trigger it. *See* Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcomm. on Crime of the House Com. on the Judiciary, Ninety-Ninth Cong., 2d Ses. 44 (May 21, 1986) [hereinafter Hearing] at the ensuing hearings, there was a general consensus that the specific predicate offenses of 'robbery' and 'burglary,' together with their respective definitions, should be replaced with the more general terms 'serious drug offense' and 'violent felony.' *See* H.R. Rep. No. 849, Ninety-Ninth Cong., 2d Ses. 3 (1986). There was considerable disagreement, though, about how to define the term 'violent felony.'
>
> * * *
>
> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term 'burglary' in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning.

Headspeth, 852 F.2d at 757-58. (Footnote omitted). Thus, the other approach in the courts of appeal, as advanced by the Fourth Circuit, directly contradicts the Eleventh Circuit's

reference back to a repealed federal statute for the definition ot burglary. *See Id.*

The Fourth Circuit approach also concludes that "we hold that the term 'burglary' as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein. So defined, the term 'burglary' does not encompass storehouse breaking, as that offense is defined in Maryland law." *Id.* at 758. Accordingly, the approach of the Fourth Circuit to the statutory interpretation problem presented by § 924(e) is to presume the common law meaning of burglary as the meaning intended by Congress in enacting the sentence enhancement provision of § 924(e).[3]

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[3]The term "burglary" has no fixed, universally-accepted and applicable definition. At common law, "burglary" defined a specific offense, the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. *See* 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13 (2d ed. 1987) at 464. In contrast, modern statutory revisions of the offense, "when viewed in totality ha[ve] resulted in a modern crime which has little in common with its common law ancestor except for the title of burglary." *Id.* at 476. "Twenty-six states varied the degree of the burglary by the type of structure, whether the structure was occupied, when the burglary occured and/or whether injury occured or was threatened." *Hill*, 863 F.2d at 1582 n.5 (collecting statutes). Present federal law is so divorced from the common law crime and from a crime involving serious potential risk of physical injury to another that one may be guilty of "burglary" if he or she merely "breaks the seal or lock . . . of any pipeline system containing interstate or foreign shipments of freight." 18 U.S.C. § 2117. Clearly, if such non-violent forms

(Footnote Continued)

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper interpretation of § 924(e) with respect to what convictions constitute predicate offenses for penalty enhancement. Some circuits look to federal law; some circuits look to state law; others look to the common law in interpreting which burglary convictions are subject to categorization as "violent felonies" under § 924(e). The previous holdings in this case by the district court and court of appeals present clear, unambiguous holdings which conflict with other courts of appeal, Congressional intent as expressed in the legislative history of the statute, and established Supreme Court precedent. Moreover, this case presents the issue that must be resolved without a cluttered fact situation and therefore is well suited to enable this Court to provide the necessary guidance.

B. This Court's Precedents Require that Only Common Law Burglaries May Qualify as Predicate Offenses Under § 924(e), Because Burglary is Undefined in the Statute and Hence Must Be Presumed to Have Been Intended by Congress to Have Its Common Law Meaning.

The Fourth Circuit's conclusion in *Headspeth* that Congress intended to revert to the common law definition of "burglary" follows from a long-established rule of statutory

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(Footnote Continued)
of burglary are defined under the Federal law, Congress cannot have intended such crimes to fall within the definition of "violent felony" which would subject someone convicted thereunder to sentence enhancement under § 924(e).

construction employed by this Court. In *United States v. Turley*, 352 U.S. 407 (1957), this Court stated that when: "A federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Id. at 411. Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *United States v. Headspeth*, 852 F.2d at 757.

As noted, § 924(e) does not define "burglary," which is a common law term of well-established meaning. *See Headspeth*, 852 F.2d at 757. By its very nature, common law burglary "presents a serious offense or risk of physical injury to another." *See Id.* at 759. Accordingly, the common law definition is entirely consistent with Congress' emphasis in § 924(e) on "violent felony."

The Fourth Circuit's holding in *Headspeth* is also consistent with another well-established rule of construction that this Court employed in *Turley*: "[I]n the absence of a plain indication of an intent to incorporate diverse state law into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." 352 U.S. at 411. *See Sherbondy*, 865 F.2d at 1005 (rejecting state law as controlling § 924(e)'s definition of "violent felony"). No such "plain indication" of an intent to incorporate all state

burglaries into the federal law definition of "violent felony" appears in § 924(e)'s legislative history.

In this case the panel majority's construction of the term burglary in § 924(e) violates this Court's well-established rules of statutory construction, as well as Congress' expressed intent.

CONCLUSION

In summary, this case presents the opportunity to establish clear guidelines for the lower courts on the proper interpretation of the term "violent felony" in 18 U.S.C. § 924(e)(1), as defined by the term "burglary" in § 924(e)(2)(B)(ii). The panel majority's interpretation conflicts with Supreme Court precedent, decisions of other courts of appeals, as well as Congress' expressed intent.

Moreover, if the panel majority's interpretation is allowed to stand, it raises grave Constitutional implications. Although most states differentiate between "violent" and "non-violent" burglaries by assigning lesser degrees to less offensive conduct, some states do not even identify a crime as "burglary" when it involves non-violent, unarmed break-ins to unoccupied buildings. Thus, under the panel majority's decision, sentence disparity would arise based solely on the variation in titles of the offense in different states.

Petitioner's prior burglary convictions simply do not constitute violent felonies, in actuality and under § 924(e)(1). Consequently, the district court erred in sentencing petitioner under § 924(e) and the Eighth Circuit erred in affirming the sentence.

For the reasons stated in this Petition, petitioner respectfully requests that the Court grant the Petition for Writ of Certiorari.

DATED this 6th day of May, 1989.

Respectfully submitted.

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tient relationship existed between Dr. Monaghan and Vera Robinson at the time the latter sought insurance coverage from State Farm. The judgment of the district court granting summary judgment on Counts I and II [2] is reversed and this portion of the case is remanded to the district court for further proceedings.[3]

We agree with the district court's conclusion that plaintiff's factual pleading as to negligently inflicted emotional distress does not state a cause of action under Nebraska law. *See James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). The judgment is affirmed as to the dismissal of Count III; judgment is reversed and remanded as to Counts I and II. Costs assessed against plaintiff.[4]

UNITED STATES of America, Appellee,

v.

Arthur Lajuane TAYLOR, Appellant.

No. 88-1408.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 19, 1988.

Decided Jan. 4, 1989.

Rehearing and Rehearing En Banc Denied March 7, 1989.

Defendant pled guilty to possession of firearm by convicted felon. The United States District Court for the Eastern District of Missouri, John F. Nangle, Chief Judge, enhanced defendant's sentence because of his previous felony convictions, including second-degree burglary conviction, and defendant appealed. The Court of Appeals, McMillian, Circuit Judge, held that defendant's sentence was properly enhanced by second-degree burglary conviction pursuant to statute allowing enhancement when defendant has three prior convictions for either violent felony or serious drug offense.

Affirmed.

Bright, Senior Circuit Judge, filed dissenting opinion.

Criminal Law ⇐1202.5

Defendant's prior second-degree burglary conviction was "violent felony" for purpose of statute allowing enhancement of sentence if defendant had three previous convictions for either "violent felony or a serious drug offense," even though elements of first-degree burglary, rather than second-degree burglary, under Missouri law referred to potential for violence, where statute defining "violent felony" stated that burglary was "violent felony". 18 U.S.C.A. § 924(e)(1), (e)(2)(B); V.A.M.S. §§ 569.160, subd. 1(3), 569.170, subd. 1.

Bruce D. Livingston, St. Louis, Mo., for appellant.

David M. Rosen, St. Louis, Mo., for appellee.

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

2. Counts I and II are identical except that Count II states a claim against the defendant on the grounds of respondeat superior.

3. On remand, before further proceedings, we think it incumbent upon plaintiff to produce for the court's inspection the actual medical bills incurred. If these bills are not in excess of $10,000 exclusive of costs and interest then the district court should dismiss plaintiff's claim for lack of jurisdiction.

4. We feel counsel could have avoided the lengthy process of appeal had he simply filed a response by affidavit, as ordered by the district court, instead of relying on his technical legal right. The district court was looking for help and did not receive it. At least counsel could have better served his client's interests and assisted an overburdened district court with factual information. The fact remains that "Exhibit A" is only barely legible even on the copy filed here.

APPENDIX A

McMILLIAN, Circuit Judge.

Arthur Lajuane Taylor pleaded guilty in the District Court [1] for the Eastern District of Missouri to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court enhanced Taylor's sentence under 18 U.S.C. § 924(e)(1) because of his previous felony convictions and sentenced him to fifteen years in prison with no possibility of probation or parole. For reversal, Taylor argues that the district court erred in considering his prior convictions for burglary in the second degree under Missouri law for purposes of the sentence enhancement provisions of 18 U.S.C. § 924(e)(1). For the reasons discussed below, we affirm the sentence imposed by the district court.

Taylor appeals only from the imposition of the enhanced sentence.[2] Because the imposition of the sentence arose out of a guilty plea pursuant to a plea agreement, there are no disputed factual issues. The issue on appeal is one of law only.

We have recently considered the issue of whether burglary in the second degree is a "violent felony" in *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988) and *United States v. Black*, 857 F.2d 1221 (8th Cir.1988) (consolidated for appeal, hereinafter *Portwood*). The reasoning of *Portwood* applies with equal weight to this case.

The sentence enhancement provisions of 18 U.S.C. § 924(e) come into play when one who has been convicted under 18 U.S.C. § 922(g)(1) has three previous convictions for either a "violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Burglary in the second degree is defined in the Missouri Revised Statutes as:

> knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein

Mo.Rev.Stat. § 569.170.1.

As a felony, burglary in the second degree is punishable by imprisonment for a term of more than one year. Mo.Rev.Stat. § 556.016.2. The Missouri statutory definition of burglary in the second degree falls squarely within the crimes delineated in 18 U.S.C. § 924(e) as predicate crimes which are to be considered for sentence enhancement purposes.

Taylor argues, however, that burglary in the second degree is not a "violent felony ... that ... involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The gist of his argument is that Missouri law distinguishes between burglary in the first degree which involves the potential for violence and burglary in the second degree which does not. According to Taylor, if any burglary presents a risk of potential injury to an innocent person, it automatically triggers the application of the more serious charge of burglary in the first degree. Mo.Rev.Stat. § 569.160.1(3). In contrast, a charge of burglary in the second degree is triggered when a burglary of an empty building occurs. Mo.Rev.Stat. § 569.170. Taylor argues that such a burglary carries with it no potential for violence since there is no one present who can be harmed during the commission of the offense. As such, he argues that burglary in the second

1. The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

2. A ruling favorable to Taylor on this issue would necessitate a remand for resentencing under 18 U.S.C. § 924(a)(1). A prerequisite to sentence enhancement under 18 U.S.C. § 924(e)(1) is three previous convictions. The prior convictions relied upon by the district court in imposing the enhanced sentence were two for burglary in the second degree, one for robbery in the first degree and one for assault.

degree cannot be a "violent felony" in the sense that Congress intended when it enacted 18 U.S.C. § 924(e)(2)(B).

In response to an argument identical to the one posed by Taylor, we held in *Portwood* that "burglary" in the sentence enhancement statute means "burglary" however a state chooses to define it. We stated that:

> Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons. A person with ... prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e).

857 F.2d at 1224. Based on the reasoning of *Portwood*, we hold that the district court did not err in considering Taylor's prior convictions for Missouri burglary in the second degree as predicate offenses which, in conjunction with his other prior convictions, subject him to an enhanced sentence under 18 U.S.C. § 924(e).

Accordingly, the judgment of the district court is affirmed.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

The majority follows the holding of *United States v. Portwood*, 857 F.2d 1221 (8th Cir.1988). In *Portwood*, the court held that Missouri's second degree burglary statute satisfies the definition of burglary as used by Congress in 18 U.S.C. § 924(e). According to *Portwood*, "the statute says 'burglary,' and we take that to mean 'burglary,' however a state may choose to define it." *Portwood*, 857 F.2d at 1223–24. Neither *Portwood*, nor this case, can be justified on careful examination of the federal statute and its legislative history.

Section 924(e) does not define "burglary." As a matter of statutory construction, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981). *See also Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249, 96 L.Ed. 288 (1952).

"Burglary" has a common law meaning: "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." W. LaFave & A. Scott, Jr., *Criminal Law* 792 (2d ed. 1986). Modern statutes setting out offenses denominated as burglary may or may not possess the common law elements of burglary. As such, burglary does not have an established "modern" meaning. Moreover, no language in the enhancement statute dictates a meaning other than the common law meaning. *See United States v. Headspeth*, 852 F.2d 753, 757–58 (4th Cir.1988).

The Eighth Circuit's interpretation of the statute produces an anomalous result, demonstrated by a comparison to *Headspeth*. In *Headspeth*, the court considered the application of section 924(e) to a defendant with two convictions for robbery and a third conviction, there in question, for the crime of "storehouse breaking," under Maryland law. Conduct amounting to storehouse breaking in Maryland (breaking into a storehouse in day or night with intent to commit a felony or theft of property of the value of $300 or more) would be at least second degree burglary in Missouri.[1] *Compare id.* at 756 (quoting Md.Ann.Code art. 27, § 32 (1971)), *with* majority op. at 626–27. *Headspeth* concluded that storehouse breaking did not constitute burglary under the enhancement provision and

1. Taylor was convicted of second degree burglary in 1971. Effective January 1, 1979, the Missouri second degree burglary statute was amended. *See* Mo.Ann.Stat. § 569.170 (Vernon 1979). The majority and the parties cite the present second degree burglary statute. For the purposes of this case, I assume the revision did not make a substantive change in the statute, as it applied to the defendant. *See State v. Eaton*, 504 S.W.2d 12, 15 (Mo.1973).

thus an enhanced penalty did not apply to the defendant.

The majority, however, subjects Taylor to the enhanced penalty because the State labeled his conduct burglary. Following the majority's analysis to its logical conclusion, a traffic offense of wrongful parking, i.e., the taking of someone else's privilege of using a parking space, if labeled burglary by a state, could be used to enhance a sentence under section 924.

I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states. Such application treats similarly situated persons differently for the purpose of a federally imposed sentence. I find it unlikely Congress would have intended such a result. *Cf.* U.S.Sent.Comm.Sent. Guidelines at 2 (Oct. 1987) (Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.) Unfortunately, neither the majority nor *Portwood* gives consideration to section 924's legislative history. *Headspeth*'s analysis of the legislative history is instructive and dispositive. The opinion by Circuit Judge Phillips of the Fourth Circuit stated:

> The government argues, however, that the legislative history and purpose of the § 924(e) sentence enhancement provision demonstrate that Congress intended the term burglary to have a more expansive definition than obtained at common law. We disagree.
>
> At one point, § 924(e) did indeed contain a definition of burglary which would encompass Maryland's storehouse breaking offense. As originally enacted, § 924(e)'s sentence enhancement provision was triggered only by previous convictions for either "robbery" or "burglary." Section 924(e)(2)(B) then specifically defined "burglary" as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense." This definition of burglary, which was considerably broader than its common law counterpart, would of course cover storehouse breaking, as that offense is defined in Maryland.
>
> But this broad statutory definition of burglary was extremely short-lived. Two days after § 924(e) was enacted—and several months before it became effective—Congress began to consider expanding the list of predicate offenses that would trigger it. *See* Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 44 (May 21, 1986) [hereinafter Hearing]. At the ensuing hearings, there was a general consensus that the specific predicate offenses of "robbery" and "burglary," together with their respective definitions, should be replaced with the more general terms "serious drug offense" and "violent felony." *See* H.R.Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). There was considerable disagreement, though, about how to define the term "violent felony."
>
> One proposed amendment, introduced by Representative Wyden of Oregon, favored a broad definition which would include crimes against both person and property:
>
> > (A) an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another; or
> >
> > (B) any felony which, by its nature, involves a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense.
>
> H.R. 4639, 99th Cong., 2d Sess. (1986) (emphasis added). This proposal drew a flurry of criticism, for the inclusion of property crimes was thought to be an unwarranted extension of federal criminal jurisdiction which would both encroach upon state sovereignty and overload the federal prison system. *See, e.g.*, Hearing at 11 (statement of Rep. Hughes).
>
> A second proposal, introduced by Representatives Hughes and McCollum, would have defined the term "violent felony" much more narrowly as "any State

or Federal felony that has *as an element* the use, attempted use, or threatened use of physical force against the *person* of another." H.R. 4768, 99th Cong., 2d Sess. (1986) (emphasis added). This definition would have excluded burglary as a predicate offense, because the actual or threatened use of force against the person is not an element of that offense, either at common law or under the original § 924(e)(2)(B). *See* Hearing at 26 (statement of Rep. Hughes) (indicating that the exclusion of burglary was deliberate).

The Hughes/McCollum proposal was roundly criticized for its failure to include burglary, arson, and other violent crimes against property which, though they did not have the actual or threatened use of force against the person as an element, nonetheless posed a severe inherent danger to human life. *See, e.g.*, Hearing at 9 (statement of Rep. Wyden); *id.* at 23–24 (statement of James Knapp, Deputy Ass't Attorney General, Crim. Div., U.S. Dept. of Justice).

The amendment that was ultimately passed, and now appears as 18 U.S.C. § 924(e)(2)(B), was a compromise of sorts. It defined the term "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year that—
>
> (i) has *as an element* the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Pub.L. No. 99–570, 100 Stat. 3207 (1986) (emphasis added). The § 924(e)(2)(B)(ii) catch-all, which permits certain felonies against property to serve as the basis for sentence enhancement, was designed to satisfy the proponents of H.R. 4639, while the limitation of that provision to crimes which present a serious risk of injury to the *person* was a concession to those who favored H.R. 4768.

Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning. Accordingly, we hold that the term "burglary," as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein. So defined, the term "burglary" does not encompass storehouse breaking, as that offense is defined under Maryland law.

Headspeth, 852 F.2d at 757–58 (footnote omitted).

For these reasons, I would hold that Missouri's second degree burglary is not "burglary" under section 924(e)(2)(B)(ii). Additionally, Missouri's second degree burglary does not fall within the statutory phrase of section 924(e) "or otherwise involves conduct that presents a serious risk of physical injury to another." That issue was also addressed in *Headspeth*.

Nor do we believe, as the government suggests, that the crime of storehouse breaking set forth in Md.Code Ann. art. 27, § 32 is an offense which, in the language of the statute, "otherwise involves conduct that presents a serious potential risk of physical injury to another." As was noted in argument before this court, the catch-all language "otherwise involves conduct that presents a serious potential risk of physical injury to another" is, in context, ambiguous. It could be read to refer, as did H.R. 4639, only to offenses which *by their very nature* pose a risk of injury to another. Since

the specifically enumerated crimes that precede the catch-all language—"burglary," "arson," "extortion," and "use of explosives"—are all offenses which by their very nature obviously pose an inherent risk of injury to the person, this interpretation may be the most plausible. On this view, the offense of storehouse breaking at issue here could not fairly be called a "violent felony" within the meaning of § 924(e)(2)(B)(ii), for by its very nature, storehouse breaking generally involves unoccupied buildings. While particular instances of storehouse breaking may, on occasion, present some risk of injury to a person, the crime itself is not one which, like common law burglary, arson, extortion, and the use of explosives, poses such a risk *by its very nature.*

Headspeth, 852 F.2d at 758–59.

Missouri law, by definition, distinguishes burglaries which are potentially violent and those not showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. Mo.Ann.Stat. § 569.160.1 (Vernon 1979). In contrast, burglary in the second degree, quoted in the majority opinion at 626, may relate to an unarmed burglary of an unoccupied building. *See, e.g., State v. Eaton*, 504 S.W.2d 12 (Mo.1973).

Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

The comment in the majority opinion at 627, quoting *Portwood*, 857 F.2d at 1224, that any conduct which may be a burglary under any state law, regardless of the details, "presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e)" does not accord with the legislative history previously quoted in this opinion.

Moreover, it seems perfectly clear that the language of the statutory provision here in question, underlined in the footnote,[2] relates to crimes other than burglary (under common law), arson, or extortion which may present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

I add a final comment. Institutionally, a panel of this court must follow the rule of law laid down in a prior panel opinion. Only the en banc court can overrule a published panel opinion. Nevertheless, neither this panel nor this writer need uncritically accept a prior panel opinion which may be flawed. I suggest the rule of this case and *Portwood* in deciding that every burglary defined under state law qualifies as a "violent felony" pursuant to 18 U.S.C. § 924(e)(2)(B)(ii) needs re-examination by this court en banc or by the United States Supreme Court.

Richard B. SANDERS, Plaintiff–Appellant,

v.

John ROBINSON, individually and as Tribal Judge of the Northern Cheyenne Tribal Court, the Northern Cheyenne Tribe, at Lame Deer, Montana, Defendants–Appellees,

and

Laura Lonebear, Defendant–Intervenor–Appellee.

No. 87–4192.

United States Court of Appeals, Ninth Circuit.

Submitted Oct. 6, 1988.

Decided Nov. 30, 1988.

Amended Dec. 8, 1988.

Husband appealed from order of the United States District Court for the Dis-

2. Section 924(e)(2)(B)(ii) reads:

(ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.* (Emphasis added).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Cause No. S1-87-147CR(2)
vs.	)	St. Louis, Missouri
ARTHUR LAJUANE TAYLOR,	)	March 2, 1988
Defendant.	)	

SENTENCING PROCEEDINGS

BEFORE THE HONORABLE JOHN F. NANGLE

APPEARANCES:

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APPENDIX B

(Wednesday morning, March 2nd, 1988, 10:00 a.m., defendant and counsel present)

THE COURT: United States versus Arthur Taylor.

Mr. Livingston, Mr. Taylor, Mr. Poehling.

Go ahead, Mr. Livingston.

Needless to say a major question concerning this sentencing has been briefed by you, studied by me; right? I mean I represent that to you -- considered by me not only, you know, on recent days but previously. And I do not agree with your assessment of the law. I'm going to tell you it's not all black and white and I don't agree with the law. I mean I don't like the idea despite Mr. Taylor's pretty miserable record. I don't like the idea of giving him this hunk of sentence. To me it's ridiculous. But I'm not Congress.

We can go into greater detail and there may be some things that you wanted to point out to me, but I have studied the statutes -- I have had this problem before -- and I have looked at your brief. And you did a good job. I want to commend you on it. And I trust -- I don't guess I have to say I trust that you will appeal from my decision and see what the Eighth Circuit does in that regard.

But you might -- you know, it's just -- I'm not telling you it's all black and white, there is some shade in there.

Second degree, I don't observe any reference in the law to any degrees in burglary nor in the cases. They don't define

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it. I know that Mr. Taylor had a couple burglary convictions that were burglary second degree as we call that in Missouri.

So that we get the record clear on the offenses, let's make sure that there is -- there is one of the offenses that the probation office or no one could check out. Isn't there one alleged offense in California? Is that right, Mr. Poehling and Mr. Livingston?

MR. POEHLING: There was one offense, Your Honor, that the probation people were unable to verify and that was from the State of California assault to do great bodily harm with force I believe. It occurred in approximately 1965.

THE COURT: I'm trying to remember. But, anyway, the offenses listed in Count -- same ones, of course, in all the counts but the offenses listed therein, let's just go down the line and make sure that as far as the record is concerned Mr. Taylor agrees or doesn't agree with them.

Let's see, this plea was to Count --

MR. POEHLING: Count III I believe, Your Honor.

THE COURT: Count III. So we will work with that one. I guess they are all the same.

And I'm troubled also by the fact that, you know, 1963 offenses. Personally it bothers me but I just don't -- my hands are tied in my judgment. And it's one of the laws Congress enacted, we all know the reasons.

But this included an offense on May 27th, 1963. The

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offenses of two counts of burglary second degree and stealing and burglary second degree. Is that correctly stated in there, Mr. Taylor and Mr. Poehling? Have you had certified copies of those?

MR. POEHLING: Yes, Your Honor. Those occurred in the Circuit Court of the City of St. Louis, yes.

Mr. Livingston has had access to the certified copies.

THE COURT: I think what we ought to do is to make the certified copies part of the record so that an appellate judge should he see them can look and see how they appear.

MR. POEHLING: I have no objection to that and I can furnish them to the Court.

MR. LIVINGSTON: Would it be appropriate to include the police report, the one police report that was available that's attached to my brief?

THE COURT: I don't think so. I think when you brief it, should you do that, you can -- you're going to refer to Mr. Taylor's participation in the acts and development of that?

MR. LIVINGSTON: Right.

THE COURT: I don't have any problem with it. What I would think, if an appellate court should determine that I'm wrong I think they would send it back to me for a hearing in that regard. You know what I'm saying? To develop -- I think they would want me to go into detail. I got enough problems doing my own job without doing theirs. But you might just --

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I think if they want it they will get it. So let's just leave this thing with the certified copies of the offenses and then I'm sure --

Let's see, then October 5th, 1971 is another burglary in the Circuit Court of the City of St. Louis. Is that a correct charge and allegation, Mr. Taylor and Mr. Livingston?

MR. LIVINGSTON: I believe it is.

THE COURT: And June 22nd, '71 is robbery first degree. Is there any question about that one?

THE DEFENDANT: No, sir.

THE COURT: So that we are clear, let me see, burglary second -- well, you claim that actually three of the offenses were burglaries; right? Three of the four?

MR. LIVINGSTON: No, Your Honor. There are five convictions, two of which --

THE COURT: One of them is kind of left out, the California. You say five including California?

MR. LIVINGSTON: That's right.

THE COURT: We don't have the California conviction as a matter of record here; am I correct?

MR. POEHLING: No, that's incorrect. It was not on the indictment but it was filed, the notice of punishment enhancement that the government filed on January 7th of 1988 sets out the ones you just talked about plus --

THE COURT: Do you have certified copies of them?

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MR. POEHLING: Yes.

THE COURT: Okay. That's what I didn't understand. So you do have certified copies and you have seen the certified copies?

MR. LIVINGSTON: Yes, I have seen them.

THE COURT: Let's order that that be made part of the record so we got a full record.

Go ahead, Mr. Livingston.

MR. LIVINGSTON: The only conviction of the five in the government's notice that we are challenging whether or not it actually is the defendant is listed in paragraph 5 of their notice of punishment enhancement. That's -- I believe there's a typo, I think it's December 1, 1965 that the certified copies will show is the date. But at any rate the paragraph 5 conviction Mr. Taylor contends is not him. The probation office of this court researched that and attempted to verify that it was him and could not do so. And we would say it's inappropriate to consider that offense for punishment enhancement.

THE COURT: Mr. Poehling, what is your response to that?

MR. POEHLING: Your Honor, the probation office has attempted to verify that and have not been able to.

THE COURT: Is that right, Ms. Hoosman?

MS. HOOSMAN: Yes, sir.

THE COURT: So there's no verification of the charge in paragraph 5.

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MR. POEHLING: So with respect of the one that is set forth in number 5, Your Honor, I would agree to withdraw that.

THE COURT: That's what I thought. I had eliminated it.

MR. POEHLING: The fourth one which is under point four which is the California conviction for assault with force, that's not disputed as I understand it. Mr. Taylor acknowledges that is him and it's a valid conviction.

THE COURT: Is that right, Mr. Taylor?

THE DEFENDANT: Yes, sir.

THE COURT: So we are down to the charges in the notice of punishment enhancement of the four paragraphs we have eliminated the fifth.

Now, with regard to that, one of them is robbery first; right, Mr. Livingston?

MR. LIVINGSTON: That's correct.

THE COURT: Another is assault with force. That's the California thing; right? You're challenging the October 5th, '71 burglary second?

MR. LIVINGSTON: And the May 27th, 1963 burglary second.

THE COURT: And the '63 burglary second. Okay.

You don't have that in here, Mr. Poehling -- oh, yes you do. Good Lord. Yes, May 27th, '63 is the first one charged in the indictment and it's also the first one set out in the notice of punishment enhancement. Okay. They are both the first

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paragraph and second paragraph of the notice of punishment enhancement referring to burglary second degree, and it's the defendant's position that that's not a viable crime, et cetera, a degree of burglary that was not contemplated by Congress when it enacted 924; is that correct, Mr. Livingston?

MR. LIVINGSTON: That's my position.

THE COURT: Now, separate and apart from that and over and above that is there anything else you want to say to me on this sentencing matter?

MR. LIVINGSTON: Well, I guess if your mind is made up I don't need to waste the Court's time. I do think that my arguments have some validity but we won't go into that.

As far as where you would sentence the defendant, if you recall he was sent to Springfield. A medical report was released and should be in the file indicating substance abuse problem and some other psychological problems and I would appreciate it if the Court would recommend that he at least initially be sent there.

THE COURT: To Springfield?

MR. LIVINGSTON: Yes.

THE COURT: Did you want to add anything, Mr. Taylor? Say anything to me?

MR. TAYLOR: No.

THE COURT: Mr. Poehling?

MR. POEHLING: No, Your Honor.

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THE COURT: With regard to the location of Mr. Taylor's incarceration I'm obliged to leave that up to the United States Prison -- Department of Justice, U. S. Prison Agency. However, if there is any question about his need for at least temporary incarceration or checking out at Springfield, Ms. Hoosman, would you check into that and see if that is suitable? And if it is appropriate, why, then it should be done.

In view of my approach to this I'm not going to make a lot of comments. I think it's -- I do not personally approve of this enactment but I'm faced with it and, as I say, it's not because Mr. Taylor has led such an exemplary life, you skirted around and got yourself into an awful lot of trouble, but that still to me doesn't justify what I have to do here.

So it will be the sentence of this Court on Count III that the defendant be committed to the custody of the Attorney General for imprisonment for a period of fifteen years and he shall not be eligible for probation or parole during that period.

I will order the special assessment of fifty dollars.

Part of this record will include the certified copies of the prior convictions as we indicated in our discussion. And my action is, of course, not based upon the -- a little more definitive here on what I will call the second -- paragraph 5 of the notice of punishment enhancement, California conviction, which has not been supported in the record.

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The other certified copies of convictions will be ordered to be made a part of this record on appeal as well as the defendant's motion to strike notice of punishment enhancement, which I will deny.

Gentlemen, I think that does it.

You may step down.

MR. POEHLING: Your Honor, the government would ask leave of Court to dismiss Counts I and II of the indictment.

THE COURT: So ordered.

Mr. Livingston, you have done a good job and stick with it.

MR. LIVINGSTON: Thank you, Your Honor.

* * * * * * * * * * * * * * * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

3/21/88
DATE

Richard A. Peterson
OFFICIAL COURT REPORTER

FORM SEL - 711 REPORTERS PAPER & MFG CO 800-626-6313

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

FILED
MAR 29 1989
EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

JUDGMENT

No. 88-1408EM

United States of America,	*	
	*	
Appellee,	*	
	*	
vs.	*	Appeal from the United States
	*	District Court for the
Arthur Lajuane Taylor,	*	Eastern District of Missouri
	*	
Appellant.	*	
	*	
	*	
	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

January 4, 1989

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 3/20/89

APPENDIX C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-1408-EM

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	Eastern District of Missouri
Arthur Lajuane Taylor,	*	
	*	
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 7, 1989

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	No. S1-87-147 CR(1)
	)	
ARTHUR LAJUANE TAYLOR,	)	
	)	
Defendant.	)	

PLEA AGREEMENT

COMES NOW the parties in the above matter, and pursuant to Rule 11(e)(2), Federal Rules of Criminal Procedure, state and disclose to the Court that the following plea agreement has been entered into between the United States of America by Richard L. Poehling, Assistant United States Attorney for the Eastern District of Missouri, and Arthur LaJuane Taylor, individually and through his attorney, Bruce Livingston.

1. The defendant, Arthur LaJuane Taylor is to enter a knowing and voluntary plea of guilty Count III of the superseding indictment in Cause No. S1-87-147 CR(1), wherein the defendant is charged with possession of a firearm by a convicted felon in violation of Title 18, United States Code ~~Appendix~~, Section 922(g)(1).

APPENDIX E

2. The, defendant acknowledges the Government's intention to seek the application of the punishment enhancement provisions of Title 18, United States Code, Section 924(e)(1). It is agreed by the parties that the defendant is not waiving his right to challenge the applicability of these provisions.

3. At the time of sentencing pursuant to the above plea, the Government agrees to seek leave of court to dismiss Counts I and II of the superseding indictment in this cause.

4. The United States Government agrees not to proceed against Arthur LaJuane Taylor for any other violations of Federal firearms laws which may have occurred within the Eastern District of Missouri during the course of the Government investigation of the defendant prior to the date of this agreement.

5. It is understood between the parties that if the defendant does not comply with the conditions referred to in point 1, as set forth above, that this agreement is null and void, and prosecution may proceed on the superseding indictment, and any other charges to which the defendant, Arthur LaJuane Taylor is subject.

6. The United States Attorney's Office for the Eastern District of Missouri has made no expressed or implied commitment, promise or expressed no opinion on behalf of any other Federal, State or local prosecuting authority.

7. The parties understand and agree that this plea agreement is subject to the approval of the United States District Court, under the provisions of Rule 11(e)(2), Federal Rules of Criminal Procedure.

8. The information set forth above is fully and completely the substance of any agreements made between the parties, and no other understandings or agreements, expressed or implied, have been made between the parties in this case.

9. The defendant, Arthur LaJuane Taylor, acknowledges that this agreement has been read to him in its entirety; that he understands its provisions, and has had any questions answered to his satisfaction; that he has been given the opportunity to consult fully and completely with his attorney before executing this agreement; that this agreement is not the result of any threats or promises of

the Office of the United States Attorney or of any other Government agent or office, other than that set forth above.

RICHARD L. POEHLING
Asst. United States Attorney
Eastern District of Missouri

ARTHUR LAJUANE TAYLOR
Defendant

BRUCE LIVINGSTON
Attorney for Defendant

88-7194

AFFIDAVIT OF SERVICE

I, Bruce Dayton Livingston, being duly sworn under oath declare that the originals of the foregoing motion to proceed *in forma pauperis* and the attached petition for writ of certiorari with its accompanying appendixes were served by depositing them in a United States mail box with first class postage prepaid, addressed to Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; and that at the same time copies were placed in the same mail box postage prepaid and addressed to David Rosen, Assistant United States Attorney for the Eastern District of Missouri, 1114 Market Street, St. Louis, Missouri 63101; and the Solicitor General, Department of Justice, Washington, D.C. 20530. Affiant swears that this motion and the accompanying petition for writ of certiorari by petitioner Taylor was deposited by affiant in the mailbox located at the corner of Broadway and Pine Street in the City of St. Louis, Missouri on May 6, 1989, within 60 days following the Eighth Circuit United States Court of Appeals denial of defendant Taylor's petition for rehearing en banc.

Bruce Dayton Livingston

Bruce Dayton Livingston

SUBSCRIBED AND SWORN TO before me this 6th day of May, 1989.

Notary Public

My Commission Expires:

KENNETH J. BARNHOUSE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JANUARY
CITY OF ST. LOUIS